No. 34333

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

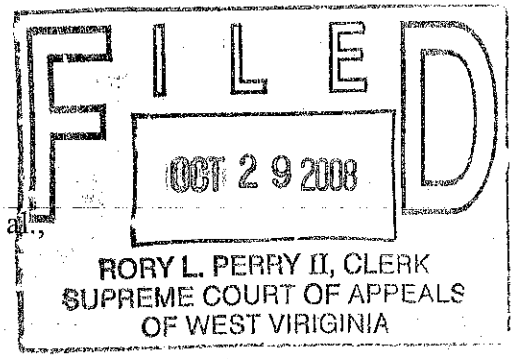
LENORA PERRINE, et al.

Plaintiffs Below/Appellants,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,

Defendant Below/Appellee.



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I. The kind of proceeding and nature of the ruling in the lower tribunal.

Plaintiffs appeal the trial court's grant of summary judgment finding that easements in deeds from the 1930s immunized the owners and operators of the smelter site from any future claim for environmental contamination regardless of the type of conduct alleged. The easements were part of a settlement between farmers and Grasselli Chemical Corporation, which owned and operated the smelter until 1928.[1] The farmers had witnessed a dramatic decline in the productivity of their farms as a result of pollution from the smelter and filed nuisance actions against Grasselli. The farmers later settled their claims, agreeing to a perpetual release that was to run with the land.

On June 15, 2004, plaintiffs, residents who live near the Spelter smelter, filed a class action complaint in the Circuit Court of Harrison County seeking the establishment of a medical monitoring fund as well as damages for the contamination of their properties and homes with arsenic, cadmium, and lead (all byproducts of zinc smelting). Following a three day evidentiary hearing in May 2006, Judge Thomas Bedell certified the matter to proceed as a class action consisting of a Property Class and a Medical Monitoring Class.

On July 6, 2007, DuPont filed a motion for summary judgment arguing that, among other things, "the claims of numerous individual plaintiffs are barred by the operation of releases and easements granted to the Grasselli Chemical Company and its successors and assigns which expressly allow for the discharge of the products and by-products of the smelter's operations over and into their lands." DuPont based its motion for summary

[1] The easements will be referred to as the "Grasselli easements."

judgment on this issue solely on the language of the Grasselli easement.[2] Plaintiffs raised several arguments against DuPont's motion on this issue including the argument that the Grasselli easements did not release wanton or reckless conduct.[3] On September 14, 2007, the trial court granted DuPont's motion for partial summary judgment on the properties that are covered by the Grasselli easements.[4] The trial court found the Grasselli easements executed in the 1920s to be valid and enforceable against current landowners who are successors in title to the grantors of the deeds and dismissed the property claims of those class members. In arriving at its conclusion that DuPont was entitled to summary judgment on this issue, the trial court concluded that the exculpatory clauses barred all claims against the owners and operators of the smelter site including claims for wanton and reckless conduct.

At trial, the plaintiffs claimed property damage in the form of remediation for the properties not covered by the Grasselli easements. The jury found that DuPont was responsible for remediation of the class area. The jury also concluded that DuPont engaged in wanton, willful, or reckless conduct.[5]

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[2] DuPont's argument regarding the Grasselli release is set out on pages 12-17 of *DuPont's Memorandum of Law in Support of Summary Judgment.* The Grasselli Deed is Exhibit H to DuPont's Memorandum. Clerk's Record at 9998-10211.

[3] *Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment* at 24. Clerk's Record at 11440-11482.

[4] The trial court entered a second *Order Granting in Part and Denying in Part DuPont's Motion for Summary Judgment* on September 20, 2007. The portions of both Orders addressing the Grasselli Deeds are virtually identical in substance. Clerk's Record at 18507-18514.

[5] Clerk's Record at 23195, Jury Verdict Form Phase IV.

II. Standard of Review.

The trial court's summary judgment raises two similar questions subject to the same de novo standard of review. First, assuming that a party may immunize itself and others for future acts of wantonness and recklessness through an exculpatory clause, was the Grasselli easement sufficient to achieve this purpose? The trial court's summary judgment answered this question in the affirmative by dismissing any property damage claims for plaintiffs whose property is covered by the Grasselli easement. The trial court's ruling on this issue was not based on any extrinsic evidence but was based solely on the language of the easement.[6] This Court has de novo review over the trial court's grant of summary judgment and applies that same standard for granting summary judgment that a circuit court must apply. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994); *Wetzel v. Employers Service Corp. of W. Va.*, 221 W. Va. 610, 656 S.E.2d 55 (2007). Under this standard, "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify application of the law." *Wetzel*, 656 S.E.2d at 59 (quoting Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)). Because the trial court's ruling was based solely on its interpretation of the easement language, this is a question of law subject to de novo review. *Wood v. Acordia of West Virginia, Inc.*, 217 W.Va. 406, 411, 618 S.E.2d 415, 420 (2005).

Second, as a matter of public policy, may a party escape liability for future acts of wantonness or recklessness through an exculpatory clause? Decisions regarding public policy considerations are questions of law that are subject to plenary review by this Court.

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[6] *Order Granting in Part and Denying in Part "DuPont's Motion for Summary Judgment,* at 2 - 5. Clerk's Record at 18507-18514.

Mitchell v. Broadnax, 208 W.Va. 36, 42, 537 S.E.2d 882, 888 (2000). This is a question of law and subject to de novo review by this Court. *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415, Syl. Pt. 1 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law . . ., we apply a *de novo* standard of review.").

III. Statement of Facts

Following the entry of the trial court's summary judgment, hundreds of property owners surrounding the former smelter were surprised to learn that their properties were not eligible for remediation because of releases, in the form of an easement, buried in their chains of title. The releases were the result of litigation from the 1920s between local farmers and one of the largest diversified chemical companies of the time, the Grasselli Chemical Company.

Grasselli was the predecessor to the DuPont chemical empire and the owner and operator of the Spelter zinc smelter from 1910 through 1928. *Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 146 S. E. 2d 57 (1928); *Bartlett v. Grasselli Chem. Co.*, 92 W. Va. 445, 115 S.E. 451 (1922). In 1919, local farmers brought trespass and nuisance actions against Grasselli Chemical Company for damage to their land and livestock. *Id.* The farmers contended that chemical deposits from the smelter, in the form of fumes, gases and dust emitted from the Grasselli's furnaces and carried over the land by air currents, were affecting the fertility of the land and the health of livestock. *Bartlett*, 115 S.E. at 451. Specifically, the farmers alleged deposits of zinc-oxide and sulphates were causing "excessive acidity of the soil and consequent diminution of its fertility and producing capacity." *Id.* at 451-452. Some of the farmers recovered judgments against Grasselli for the

damage to their land, but the West Virginia court held that these judgments were for nuisance actions and, as such, Grasselli would be susceptible to future actions. *Id.* at 453.

To stop the successive nuisance suits from the same landowners, *see e.g., Lyon v. Grasselli Chemical Co.*, 146 S.E. at 58 (second action by Lyons against Grasselli for nuisance), Grasselli entered into settlements that required the landowners to give an easement to Grasselli. Reflecting the concerns raised in the lawsuits about the productivity and fertility of the land, the releases primarily sought to excuse Grasselli from any injury "to said land of said [property owners], the productivity and/or products of said land, and/or any property or thing, real, personal or mixed, therein or thereon." The release purported to grant a perpetual easement, running with the land, to the plant owners and operators allowing for the discharge of substances onto their properties.[7] Each deed contained the same language releasing current and future operators and owners of the zinc plant from liability for property damage and granting the plant a perpetual easement for the discharge of substances over the adjoining owners' lands. The full text of the easement is set forth below.[8]

> Now, therefore, in consideration of the premises and for and in consideration of the sum of ten dollars ($10) and other money in hand paid by said parties of the second part to said party of the first part, the receipt whereof is hereby acknowledged by said party of the first part, the said party of the first part does hereby remise, release and forever discharge said parties of the second part, and each of them, and the successors and assigns of them and of each of them, of and from all actions, causes of action, suits, liabilities, damages, claims, debts and/or demands, in law or equity, which said party of the first part, ever had or now has or which he, or the heirs, personal representatives or assigns of him, hereafter can, shall or may have against said parties of the second

[7] A representative deed is attached as Exhibit 18 to *Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment.* Although the deeds enumerated various forms of discharges, the deeds did not specifically include "heavy metals" as a permissible discharge. Clerk's Record at 11483-11677.

[8] A deed containing the easement is attached to *DuPont's Memorandum of Law in Support of Its Summary Judgment Motion* as Exhibit H. Clerk's Record at 9998-10211.

part, or either of them, or the successors or assigns of them or of either of them, for or by reason of any and all injuries, damages and/or losses of every kind whatsoever, to said land of said party of the first part, the productivity and/or products of said land, and/or any property or thing, real, personal, or mixed, therein or thereon, and or any use usefulness, value or rental value thereof, which have been caused, arisen or resulted, or are caused, arise or result of hereafter may or shall be caused, arisen or result from, by reason or out of said plant or the past, present or future existence, construction, maintenance or operation of said plant, or any substance or substances in the past, present or future produced, discharged, emanating, cast, precipitated or escaping therefrom. The release aforesaid and all of the grants, releases, rights, easements, restrictions, covenants and agreements in or by this present deed made, granted, created or imposed shall include and extend to said plant, or any part thereof, as heretofore and/or now existing, constructed or being constructed, maintained or operated, and to any enlargement, alteration or change thereof, and to any new or substituted or other or different plant which hereafter may or shall exist or be constructed, maintained or operated, on said land now owned by said Delaware corporation, for the purposes aforesaid or any of them and to any and all of the structures, equipment, machinery, appliances, processes and/or methods heretofore and/or now existing or used, or any enlargement, alteration or change thereof, or any new or substituted or other or different structures, equipment, machinery, appliances, processes and/or methods for the purposes aforesaid or any of them, and to the same, or any greater or less, size, capacity or extent or quantity of operation or products as or than in the past or present. The substance or substances hereinbefore and elsewhere in this deed mentioned do and shall include and extend to any and all solids, liquids, smokes, dust, precipitates, gases, fumes, vapors and other matters and things which have been, are or hereafter may or shall be produced, discharged, emanated, cast or precipitated, or did, do or shall escape, by or from said plant in, about or by reason of the manufacture, smelting, extraction or production of zinc or any product thereof or any composition of matter or other article consisting or partly consisting of the same, or anything used or acquired for use in, about or for said manufacturing, smelting, extraction and/or production.

And for the consideration aforesaid said party of the first part does hereby grant and convey to said The Grasselli Chemical Company, a Delaware corporation as aforesaid, and its successors and assigns forever, the full, free and perpetual right to construct, maintain, operate and use the said plant, structures, equipment, machinery, appliances, processes and/or methods as heretofore and/or now existing, constructed or being constructed, maintained, operated or used and/or any such enlarged, altered or changed or new or substituted or other or different plant, structures, equipment, machinery, appliances, processes and/or methods,

and to carry on the manufacturing, smelting, extracting and/or producing operation aforesaid, and to produce, discharge, emanate, cast, precipitate and cause or permit to escape the aforesaid substance or substances therefrom and over, on and/or onto said land of said party of the first part or any property or thing, real, personal or mixed, therein or thereon, without any compensation except the above recited consideration already received as aforesaid, and free, acquit and released from any and all actions, causes of action, suits, liabilities, damages, claims, debts, and/or demands of or by said party of the first part, or the heirs, personal representatives or assigns of him, said party of the first part, for himself, and the heirs, personal representatives and assigns of him, hereby releasing any and all such actions, causes of action, suits, liabilities, damages, claims, debts and/or demands.

Said party of the first part, for himself, and the heirs, personal representatives and assigns of him, covenants and agrees that all of the grants, releases, rights, easements, restrictions, covenants and agreements in or by this deed made, granted, created or imposed shall run with said land and the title thereto and shall bind said land, said party of the first part, and the heirs, personal representatives and assigns of him, and every subsequent owner, possessor or occupant of said land, or any part thereof, and shall inure to the benefit of said parties of the second part and each of them, and the successors and assigns of them and each of them forever.

Said party of the first part covenants and agrees that he is the owner in fee simple of the tract or parcel of land hereinbefore described, free of all liens and encumbrances, and that he has good and lawful right to grant, make, create, and impose the grants, releases, rights, easements, restrictions, covenants and agreements in this deed contained.

The said party of the first part agree to dismiss, at his own costs, any and all actions at law and suits in equity now pending in the Circuit Court of Harrison County, West Virginia, in which he is plaintiff, either alone or with others, and said parties of the second part, or either of them, are defendants or defendant.

This deed is executed by said party of the first part for the consideration above expressed, and without any promise of representation whatsoever by said parties of the second part, or either of them, or by the agents, attorneys, or representatives of them or either of them, to said party of the first part, or to the agents, attorneys or representatives of him.

At the time the easements were granted, Grasselli had in its possession a thorough scientific study of the detrimental environmental effects caused by the smelter.[9] Successfully blocking any attempts by the public to access this document, Grasselli kept the contents of this detailed study secret. The study was performed by preeminent scientists of the day and confirmed that plant emissions were poisoning livestock and injuring and killing extensive areas of vegetation. Commissioned by Grasselli in 1919, two prominent geologists, Dr. Firman E. Bear and Francis M. Morgan, investigated the farmers' claims of pollution. Bear and Morgan conducted interviews, collected soil samples, analyzed the zinc content of flue dust and found high levels of zinc. They photographed the surrounding land and conducted laboratory studies documenting the dramatic effects of the smelter on the surrounding environment. Even though this report addressed the very claims being brought by the 1920s plaintiffs, Grasselli continued fighting the lawsuits and kept the Bear and Morgan investigation and report "confidential."[10] The Bear and Morgan report remained hidden in the files of the DuPont document repository until this litigation.

IV. Assignment of Error

Under West Virginia law, the broad, general exculpatory clauses in the Grasselli easements do not bar claims for wanton or reckless conduct. Because the trial court dismissed all property damage claims for plaintiffs covered by the Grasselli easements, including claims for wantonness or recklessness, the trial court departed from West Virginia law.

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[9] Amter, Steven, *Rebuttal Opinions About Contamination at Spelter, West Virginia*, at 6-8 attached as Exhibit 19 to *Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment*. Clerk's Record at 11483-11677.

[10] *Id.*

Also while West Virginia has not expressly repudiated anticipatory waivers of wanton or reckless conduct, many jurisdictions have. Plaintiffs urge this Court to hold that anticipatory waivers of wanton, reckless, or intentional conduct violate public policy and are void.

V. Discussion of the Law

The trial court ruled that the exculpatory clauses contained in the Grasselli easements barred the property damage claims of the members of the Property Class who are successors in title to the grantors in the Grasselli easements. Applying this exclusion across the board, the trial court made no distinction between property damage claims based on negligence and damage claims based on wanton or reckless conduct. By disregarding this distinction and dismissing *all* property damage claims, the trial court departed from West Virginia law and is in conflict with the prevailing view of nearly all jurisdictions that exculpatory agreements immunizing a party against claims based on grossly negligent, wanton, willful, or intentional conduct violate public policy and are void as a matter of law.

While this Court has unequivocally held that general exculpatory clauses, like those found in the Grasselli easements, do not release claims for wanton and reckless conduct, it has never addressed whether anticipatory releases that bar claims for wanton, reckless, or intentional conduct violate public policy and are void as a matter of law. Plaintiffs ask this Court to hold that anticipatory releases that purport to release claims for wanton, reckless, or intentional conduct violate public policy and are void as a matter of law.

A. Under West Virginia law, the general exculpatory clause in the plaintiffs' chains of title does not shield DuPont from liability for reckless or wanton conduct.

The trial court's finding that the general exculpatory clause was a complete defense to claims of recklessness and wantonness is in direct conflict with West Virginia law. Under West Virginia law, "a general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate such was the plaintiff's intention." *Murphy v. North American River Runners, Inc.*, 186 W. Va. 310, 316, 412 S.E.2d 504, 511 (1991). Six years after the *Murphy* decision was published, this Court reaffirmed West Virginia's position on this issue in *Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 126, 506 S.E.2d 554, 569 (1997) ("It is well established in this jurisdiction that when a person gives another entity a release, the release does not absolve a party from liability for the party's intentional, reckless or grossly negligent conduct.").[11], [12]

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[11] See also *Johnson v. Junior Pocahontas Coal Co.*, 160 W. Va. 261, 270, 234 S.E.2d 309, 314 (1977) ("[Exculpatory] clauses . . . may not be raised as a complete shield from all liabilities which may be indicated by evidence showing defendant's violations of rules, regulations, and laws, its willful, wanton and reckless actions and conduct . . . ."); *Stamp v. Windsor Power House Coal Co.*, 154 W. Va. 578, 584, 177 S.E.2d 146, 150 (1970) ("This Court, as presently constituted does not necessarily approve of the holding in the *Griffin* case that a surface owner could not recover for a willful or wanton act . . . ."); *Continental Coal Co. v. Connellsville By-Product Coal Co.*, 104 W. Va. 44, 138 S.E.2d 737 (1927) (suggesting that "unnecessary or improper conduct" of mining operation could overcome waiver for damages to surface.).

[12] In *Rose v. Oneida Coal Co.*, 180 W. Va. 182, 375 S.E.2d 814 (1988), this Court upheld a summary judgment finding that the exculpatory clause barred the plaintiffs' claims. While the complaint alleged that the defendant acted "willfully, negligently, and wantonly," there is no suggestion in the opinion that the plaintiffs argued that the exculpatory clause was not a defense to reckless or wanton conduct. Rather, the plaintiffs argued that the waiver in the deed was void as contrary to public policy. This Court affirmed the trial court's summary judgment as to "common law negligence." The *Oneida* decision did not address whether exculpatory clauses would shield the defendant from willful, wanton, or reckless conduct.

Furthermore, there are no reported cases of a West Virginia court enforcing an exculpatory provision releasing claims for future willful, wanton, or oppressive conduct.

In the *Tudor* case, this Court's most recent consideration of this issue, a nurse sued her former employer, a hospital, for providing poor and potentially unsupported references. The hospital argued that it was exempt from any claims because the nurse had signed an authorization releasing the hospital from "all liability or responsibility" in the dissemination of employment information to prospective employers. This Court rejected the hospital's exculpatory agreement defense, stating:

> It is well established in this jurisdiction that when a person gives another entity a release, the release does not absolve a party from liability for the party's intentional, reckless or grossly negligent conduct. *See Murphy v. North Am. River Runners, Inc.*, 186 W. Va. 310, 316, 412 S.E.2d 504, 510 (1991) (stating that "a general clause in an exculpatory agreement or anticipatory release exempting the defendant from all liability for any future negligence will not be construed to include intentional or reckless misconduct or gross negligence, unless such intention clearly appears from the circumstances") (citing Restatement (Second) of Torts § 496B cmt d (1963, 1964)). Moreover, "in order for the express agreement . . . [to 'release from all liability or responsibility all persons, places or business, and municipalities supplying such information'] to be effective, it must also appear that its terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm.'" 186 W. Va. at 316, 412 S.E.2d at 510.

203 W. Va. at 126, 506 S.E.2d at 569. This Court concluded it was undeniable that, when the nurse signed the authorization, she was not giving the hospital carte blanche authorization to release false information about her. Although the release did not bar the nurse's claims, the question of whether the information was false or true was an issue for the jury.

Three years after the *Tudor* decision, West Virginia's law on this issue was discussed at length by the Superior Court of Pennsylvania. In *Ratti v. Wheeling Pittsburg*

Steel Corp., 758 A.2d 695 (Pa. Super. Ct. 2000), the Superior Court of Pennsylvania was asked whether a general indemnification clause that expressly indemnified for negligent acts would be construed to indemnify for acts of gross negligence. Because the injury occurred in West Virginia, the Pennsylvania court examined both Pennsylvania and West Virginia law to answer this question and concluded that there was no conflict between the laws of the two states concerning this issue. After considering West Virginia law, including the *Tudor* and *Murphy* decisions, the Pennsylvania court held that a general exculpatory clause covering negligent acts does not encompass acts of gross negligence. *Id.* at 705 Relying on *Tudor*, the Pennsylvania court refused to "read the term 'gross negligence' into an indemnity provision in which it is not specifically manifested."

Assuming that West Virginia law will allow a party to exculpate itself (through use of express language) for wanton or reckless conduct, the Grasselli easements fail to do so. Under *Murphy*, the language of the Grasselli easements that purportedly releases the owners and operators from all liability for future losses or damages will not be construed to release claims for wanton or reckless conduct. *See also Ratti*, 758 A.2d at 704 ("If it had been the intention of the parties to cover liability" for wantonness or recklessness, "it required no extraordinary skill in draftsmanship to so bind the [landowner] in words or phrases of absolute certainty" as to release claims for wantonness and recklessness.). DuPont offered no admissible evidence of circumstances that would clearly contradict the interpretation of the easement under *Murphy*. Without such evidence, the trial court's broad interpretation of the easement conflicts with West Virginia law and is due to be reversed.

B. Exculpatory agreements insulating parties against actions for grossly negligent, wanton or intentional conduct are void as matter of public policy.

Exculpatory agreements are generally disfavored by the law because they tend to sanction conduct that falls below an acceptable standard of care. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 557 N.W.2d 60 (1996). Nevertheless, recognizing the right of parties to contract freely, the law has generally enforced exculpatory agreements insulating parties from claims of *ordinary negligence* where the contracting parties have equal bargaining power and the agreement does not run afoul of the public interest. *See e.g.,* Restatement (Second) of Contracts § 194, cmt a (1981)("a party to a contract can ordinarily exempt himself from liability for harm caused by his failure to observe the standard of reasonable care imposed by the law of negligence"); 6A Corbin on Contracts § 1472 (1962) at 596-597 ("It is generally held that those who are not engaged in public service may properly bargain against liability for harm caused by their ordinary negligence in performance of a contractual duty"); 15 Corbin on Contracts § 85:18 (rev. ed. 2003) at 455 ("The general rule of exculpatory agreements is that a party may agree to exempt another party from tort liability if that tort liability results from ordinary negligence.").

In contrast to their willingness to enforce exculpatory agreements protecting against ordinary negligence claims, courts around the country have generally refused to enforce exculpatory provisions that attempt to absolve a party of its wanton, reckless or intentional conduct. *Rhino Fund, LLLP, v. Hutchins*, ___ P.3d ___, 2008 WL 2522308 at *4 (Colo. App.)(observing "most courts will not enforce exculpatory and limiting provisions if they are unconscionable, if they result from unreasonable bargaining power, *or if they purport to relieve parties from their own willful, wanton, reckless or intentional conduct.*"(emphasis

added)); *Moore v. Waller*, 930 A.2d 176, 179 (D.C. App. 2007)("after surveying 'leading authorities' and cases from other jurisdictions, we recognize that courts have not generally enforced exculpatory clauses to the extent that they limited a party's liability for gross negligence, recklessness or intentional torts.")(internal citations omitted); *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship*, 115 Hawaii 201, 223, 166 P.3d 961, 983 (2007)(noting "most jurisdictions deciding this issue have held that an exemption for intentional torts and reckless conduct is void as against public policy."); *City of Santa Barbara v. Superior Court of Santa Barbara*, 41 Cal. 4th 747, 750-751, 161 P.3d 1095, 1096-1097 (2007)(concluding that "consistent with dicta in California cases and with the vast majority of out-of-state cases and other authority, that an agreement...purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy").[13]

Exculpatory agreements that try to excuse liability caused by grossly negligent, wanton or willful conduct are at odds with the law of torts, which attempts to impose "standards of conduct for the protection of others against unreasonable risk of harm." Restatement (Second) of Contracts § 195(1) & cmt a (1981). Consequently, the law is

[13] See also 6A Corbin on Contracts § 1472 (1962) at 596-597 (an exculpatory provision "is always invalid if it applies to harm willfully inflicted or caused by gross or wanton negligence"); 15 Corbin on Contracts (rev. ed. 2003) § 85:18 at 455 ("Courts do not enforce agreements to exempt parties from tort liability if the liability results from that party's own gross negligence, recklessness, or intentional conduct."); 8 Williston on Contracts § 19:23 (4th ed. 1998) at 291-292 ("An attempted exemption from liability for a future intentional tort or crime, or for a future willful or grossly negligence act is generally held void, although a release exculpating a party from liability for negligence may also cover gross negligence where the jurisdiction has abolished the distinction between degrees of negligence and treats all negligence alike."); 57A American Jurisprudence Second, Negligence, § 58 at 127-128 ("It has been held that a person may not exonerate himself or herself from liability for intentional torts, for willful or wanton misconduct, or for gross negligence by the use of exculpatory language; such a provision is void against public policy. Thus, to the extent that agreements purport to grant exemption from liability for willful or grossly negligence acts, they are wholly void, and an injured party may recover for acts of gross negligence despite a valid release for negligence.").

unwilling to permit "an agreement that would remove a party's obligation to adhere to even a minimal standard of care, thereby sheltering aggravated misconduct." *City of Santa Barbara v. Superior Court of Santa Barbara*, 41 Cal. 4th 747, 762, 161 P.3d 1095, 1105 (2007)(citations omitted). Courts have reasoned that a public policy exception is widely accepted because it is "based on a recognition that sound public policy requires greater deterrents to gross negligence or intentional misconduct than to ordinary negligence. Moreover, enforcing an exculpatory clause as applied to a party's gross misconduct does little to aid the freedom of contract, because while businesspersons may reasonably anticipate accidents or ordinary negligence and account for who bears the risk of damage in setting the price of a contract, contracting parties rely on the other's good faith and fair dealing." *Laeroc v. Waikiki Parkside, LLC, v. K.S.K. (Oahu) Ltd. P'ship*, 115 Hawaii 201, 223-224, 166 P.3d 961, 983-984 (2007)(quoting *Dominici v. Between the Bridges Marina*, 375 F. Supp. 2d 62, 68 (D. Conn. 2005)).

Most jurisdictions unequivocally refuse to enforce an exculpatory agreement purporting to exempt grossly negligent, wanton, reckless, or intentional conduct.[14] Even the

[14] *See e.g., Airfreight Exp. Ltd. v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 158 P.3d 232, 240 (Ariz. App. 2007)(adopting policy consistent with Restatement (Second) of Contracts § 195, which prohibits contracts exempting parties from intentional or reckless tort liability); *City of Santa Barbara v. Superior Court of Santa Barbara*, 41 Cal. 4th 747, 750, 161 P.3d 1095, 1096 (2007)("consistent with dicta in California cases and with the vast majority of out-of-state cases and other authority, that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy."); *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*, ___ P.3d ___, 2008 WL 2837540 at *4 (Colo. App.)("Exculpatory clauses insulting a party from its own negligence, though disfavored, are permitted in Colorado if one party is not at a significant disadvantage in bargaining. However, an exculpatory clause is against public policy if it enforces a release from willful and wanton conduct." (Internal citations omitted)); *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465 (Col. 2004)("In no event will an exculpatory agreement be permitted to shield against a claim of willful and wanton negligence."); *Western Alliance v. Wells Fargo Alarm Svcs.*, 965 F. Supp. 271, 279 (D. Conn. 1997)(landlord could not use exculpatory provision to escape liability for gross negligence, recklessness or intentional conduct); *Wright v. Sony Pictures Entertainment, Inc.*, 394 F. Supp. 2d. 27, 33 (D.D.C. 2005)(adopting Restatement approach that a party may not waive recklessly or

courts that have not formally adopted a whole-sale repudiation of exculpatory agreements attempting to exempt grossly negligent, wanton, willful and/or intentional conduct, have nevertheless regarded such agreements suspiciously and have, ultimately, refused to enforce such provisions on the basis of public policy. These courts retain the right to restrict a contract for the common good but only do so after considering the facts and circumstances of the agreement and the parties involved. Nebraska, for example, weighs the rights of the

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intentionally caused harms); *McFann v. Sky Warriors, Inc.*, 268 Ga. App. 750, 751 603 S.E.2d 7, 11 (Ga. App. 2004)("[I]n Georgia a party may not obtain an exculpatory agreement for its gross negligence or willful misconduct."); *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. Partnership*, 115 Hawaii 201, 166 P.3d 961, 981-84 (2007)(holding that a nonrecourse provision that explicitly protected a party from tort liability was permissible as long as the agreement was not unconscionable and it was knowingly and willingly made, and was valid to the extent that it did not waive liability in situations of intentional or reckless conduct); *Falkner v. Hinckley Parachute Ctr.*, 178 Ill. App. 3d 597, 127 Ill. Dec. 859, 864, 533 N.E.2d 941, 946 (Ill. App. 1989)(court voided clause exculpating school from responsibility for the results of willful or wanton misconduct, reasoning that it was against public policy); *The State Group Industrial (USA) Ltd. v. Murphy & Associates Industrial Svcs., Inc.*, 878 N.E.2d 475, 479 (Ind. App. 2007)("although we have found no Indiana decision indicating that a party may not contract against liability for intentional tortuous acts, this rule has a general consensus among our sister states."); *Wolfgang v. Mid-American Motorsports, Inc.*, 898 F. Supp. 783, 784, 788 (D. Kansas 1994)(release void to the extent it purported to relieve defendants of liability beyond ordinary negligence); *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254, 259-260, 686 A.2d 298, 301 (Md. App. 1996)(identifying three circumstances in which exculpatory clauses in contracts are invalid and will not be enforced: when a party to the contract attempts to avoid liability for intentional conduct or harm caused by reckless, wanton or gross behavior; when the contract results from grossly unequal bargaining power; and when the transactions is one adversely affecting the public interest."); *In re Cunningham*, 365 B.R. 352, 365 (D. Mass. 2007)(contract provision exempting a party from tort liability for harm caused intentionally or recklessly was unenforceable as against public policy); *Ball v. Waldoch Sports, Inc.*, 2003 WL 22039946 at *3(Minn. App. 2003)(Minnesota law is settled that "an exculpatory clause is invalid if it seeks to exonerate for willful or wanton recklessness or intentional torts."); *Public Svc Ent. Group v. Philadelphia Elec.*, 722 F. Supp. 184, 211 (D.N.J. 1989)(refusing to extend exculpatory clause to willful violation of safety regulations and intentionally tortious conduct); *Conant v. Rodriguez*, 113 N.M. 513, 838 P.2d 425, 428 (N.M. App. 1992)(release was invalid because it released defendant from liability for willful or reckless misconduct); *American Motorist Ins. Co. v. Morris Goldman Real Estate Corp.*, 277 F. Supp. 2d 304, 307 (S.D.N.Y. 2003)(Claims of gross negligence cannot be precluded under exculpatory clause nor diminished under a liability-limiting clause in part because the risk of harm to the public increases when contracting parties exempt themselves from liability for their intentional or reckless conduct); *In re Sikes*, 184 B.R. 742, 747 (M.D. Tenn. 1995)(rejecting exculpatory provision limiting tort liability for harm caused by intentional or reckless misconduct); *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574, 576 (Tex. App. 1986)(an exculpatory release for gross negligence is against public policy); *Finch v. Southside Lincoln-Mercury, Inc.*, 274 Wis. 2d 719, 685 N.W.2d 154, 160, 163-64 (Wis. App. 2004)(holding exculpatory clauses were unenforceable on grounds of public policy where the alleged harm was caused intentionally or recklessly).

parties to contract against the protection of the public. "Where the greater the threat to the general safety of the community, the greater the restriction on the party's freedom to contractually limit the party's liability." *The New Light Co., Inc. v. Wells Fargo Alarm Svcs.*, 247 Neb. 57, 63, 525 N.W.2d 25, 30 (Neb. 1994)(finding alarm company's wantonness and willful misconduct would have a tendency to put human life at risk and be injurious to the public and, therefore, exculpatory provision would be void against public policy).

Like most states, West Virginia scrutinizes exculpatory provisions appearing in contracts. West Virginia's Supreme Court of Appeals has warned that exculpatory provisions must be examined closely for unconscionability, particularly where rights, remedies, and protections that exist for the public benefit are involved. *Dunlap v. Berger*, 211 W. Va. 549, 558, 567 S.E.2d 265, 274 (2002). The welfare of the general public supersedes the right to contract. *Wellington Power Corp. v. CAN Surety Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005). Whether a particular contract violates public policy is a question of law which the court must decide in light of the particular circumstances of each case. *Id.* at 686 (quoting *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325, 325 S.E.2d 111, 114 (1984)).

"[T]here is no absolute rule by which courts may determine what contracts contravene the public policy of the state. The rule of law most generally stated is that public policy is that principle of law which holds that no person can lawfully do that which had a tendency to be injurious to the public or against the public good… even though no actual injury may have resulted therefrom in a particular case to the public." *Id.* The sources that determine our public policy include: federal and state constitutions, statutes, judicial

decisions, common law, and "the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people" for whom government is established. *Id.*

In the instant action, there are two competing public policies: the right to contract and the need to protect the health and welfare of the general public. DuPont sought and the trial court awarded immunity for wantonly and recklessly doing precisely that which the government has forbidden: improperly disposing of its emissions and waste products. During its ownership of the Spelter smelter, DuPont failed to use pollution control devices and generated a mountain of hazardous waste. From 1971 through 1998, the West Virginia Department of Environmental Protection and the United States Environmental Protection Agency recorded numerous emissions violations from the zinc plant—emissions that threatened the health and welfare of the community.[15]

Unquestionably, the immunity that DuPont seeks runs afoul of public policy. DuPont seeks a perpetual easement to deposit hazardous waste and to do so wantonly, recklessly or even intentionally. The health and welfare of the public at large is at risk. By relieving DuPont of liability for wanton and reckless conduct, the trial court removes DuPont's obligation to adhere to even a minimal standard of care and, in turn, fosters aggravated misconduct.

VI. Conclusion.

The plaintiffs respectfully request that this Court reverse the trial court's summary judgment that dismissed all property claims of plaintiffs covered by the

[15] *See* Bernard Reilly's Inspections/Observations Summaries attached as Exhibit 21 to *Plaintiffs' Response in Opposition to Defendant DuPont's Motion for Summary Judgment.* Clerk's Record at 11485-11677.

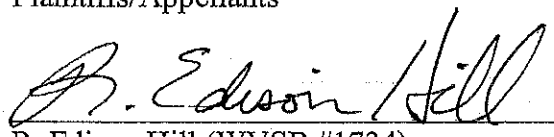
Grasselli easements. The plaintiffs ask this Court to find as a matter of law that the language in the Grasselli releases did not bar future claims of wantonness and recklessness.

In the alternative, the plaintiffs respectfully request that this Court hold that clauses in exculpatory agreements that purport to release future claims of wantonness or recklessness are void because they violate the public policy of West Virginia.

After finding that the wanton and reckless claims are not barred by the Grasselli releases, the plaintiffs also request that this Court instruct the trial court to enter an order fixing an amount necessary to remediate the properties that were improperly excluded by the trial court's summary judgment.

Respectfully submitted,

Plaintiffs/Appellants



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No. 34333

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al.

Plaintiffs Below/Appellants,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, et al.,

Defendant Below/Appellee.

CERTIFICATE OF SERVICE

I, R. Edison Hill, counsel for Plaintiffs, hereby certify that I have served a true and exact copy of "**APPELLANTS' BRIEF**" upon the following counsel via US Mail this 29th day of October 2008:

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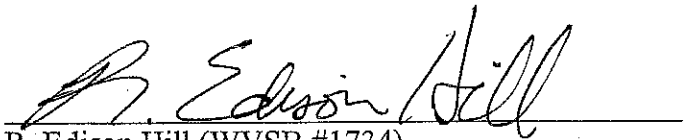

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